No. 968

FILED
MAY 3 1957
JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

No. 48—October Term, 1956

Docket No. 24114

UNITED STATES OF AMERICA,

Appellee,

v.

PETER POSTMA and JOSEPH P. McCONNON,

Defendants-Appellants,

and

NICHOLAS ROBILOTTO,

Defendant.

PETITION OF JOSEPH P. McCONNON FOR REHEARING APPEAL AND/OR FOR A STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Joseph P. McConnon, by his attorneys, Lieberman, Katz & Aronson, Esqs., respectfully petitions this Court for a rehearing in the appeal in the above entitled case, and if denied, for a stay of the mandate and for a continuance of bail pending an application for a writ of certiorari, and in support thereof, respectfully shows:

UNITED STATES COURT OF APPEALS
FILED
MAR 3 1957
SECOND CIRCUIT

I.

Nowhere in its opinion of February 21, 1957, affirming the judgment of conviction, did the Court indicate that it was not prejudicial to McConnon to try the case upon an indictment charging a conspiracy from June, 1951 to April, 1955 "to cause work stoppages" (under the indictment the government was permitted to introduce testimony of a threat made by Postma in 1951 and of the course of bitter bargaining in 1952 between the union and the truckers, culminating in a strike, which began on November 7, 1952 after collective bargaining broke down when "Postma unexpectedly refused the truckers' offer in a surly manner", as this Court put it), and to convict him on the theory that the conspiracy was to interfere with commerce by extorting money "under threat of continuing a strike". Surely there is a vital difference between a conspiracy to cause strikes and a conspiracy to continue a strike. The range and latitude of the inquiry is much broader in the former than in the latter. If, as the Court stated in its opinion, the conspiracy of which McConnon was convicted was a conspiracy to continue the strike entered into on November 13, 1952, then all the testimony of occurrences prior to the strike was improperly and prejudicially received.

We submit that there was a fatal variance between the conspiracy charged in the indictment which was "to cause work stoppages" and a conspiracy to *continue* a strike,—fatal because the variance was sorely prejudicial to McConnon, who, as this Court agreed, "for the first time cooperated with Postma after the strike had begun" on November 13, 1952. On the basis of the charged conspiracy, a mass of evidence of excessive demands by the union and surly conduct of Postma was introduced at the trial, the effect of which was to inflame the jury and to deprive McConnon of a fair trial.

If it is true that the conspiracy was one based upon the fact that McConnon "cooperated" with Postma after the strike began, as this Court said, then the charge to the jury was erroneous and misleading, for it was predicated on the government's theory that there existed a conspiracy prior to the inception of the strike, of which Postma was a member and which "McConnon joined at a later date" (R. 567a).

This Court in its opinion indicated that the conspiracy was "to exploit the strike" and that McConnon's guilt derives from the fact that he "allied himself with Postma's effort to shakedown the truckers". This being so, it is plain that the introduction of the mass of evidence of exacerbated contract negotiations was wholly unfair to McConnon.

We respectfully submit that it is error to try a defendant upon an indictment charging a conspiracy found to be non-existent and, under cover of such an indictment, to introduce a mass of evidence wholly irrelevant to a conspiracy ultimately found to be a basis upon which to sustain the verdict of the jury. Such a variance is so prejudicial as to require a reversal.

II.

In holding that McConnon was guilty of conspiracy because he "cooperated" with Postma "in committing an illegal act", the Court overlooked the established legal principle that one who aids and abets the commission of a substantive offense may himself be convicted as a principal *but not as a conspirator*. The commission of the substantive crime as an aider, abettor or counsellor is a crime separate and apart from the commission of the crime of conspiracy. In *Pereira* v. *U. S.*, 347 U. S. 1, 11, the Court said:

> "Aiding, abetting and counselling are not terms which presuppose the existence of an agreement. Those

> terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. * * * Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

There was no proof here that there was an agreement to cause or to continue the strike; nor was there an agreement to coerce the truckers by threat to continue the strike. Under the evidence, McConnon and Postma might have been convicted of the substantive crime of extortion had such a count been contained in the indictment; but, we submit, McConnon could not be convicted of conspiracy, the only count upon which the government elected to try this case.

III.

We respectfully submit that the Court erred in holding that "any difference (between McConnon and Postma) in their motives or in their relationship to the parties to the strike is without significance for present purposes". Such differences, we believe, are crucial in a determination of the existence of criminal intent. Unless McConnon entertained the intent "to interfere with interstate commerce by extorting money * * * under threat of continuing a strike" he cannot be convicted of conspiracy.

The differences in motivation and relationship between the parties are of vital and discriminating significance in this type of case. In a New York case of extortion (during the Congressional debates on the Hobbs Act the sponsors repeatedly stated that the definition of extortion in the Hobbs Act was taken from the definition of extortion in the New York Act), the Court of Appeals of New York

stressed the very difference this Court deems to be of no significance. In *Scheppa* v. *New York*, 295 N. Y. 359, Scheppa and Calabria were indicted on two counts for obtaining money from Ambrogi by means of threats; one for conspiracy and the other for the substantive crime of extortion. At the close of the trial, *the conspiracy charge was dismissed.* Calabria was acquitted and Scheppa was convicted of extortion. The State argued that the two defendants were acting together that is, that they cooperated, each with the same guilty intent. (Similarly this Court bases its opinion on the fact that McConnon cooperated with Postma.) The facts showed that Calabria took part in the very conversation in which the threats were made; indeed he talked to Ambrogi out of Scheppa's hearing, elaborated on Scheppa's threatening statements and urged Ambrogi to make the payments demanded. (McConnon talked with Vogel but did not make any threatening statement nor did he urge Vogel to make the payment demanded.) There was no proof that Calabria, to whom the money was paid by Ambrogi, turned it over to Scheppa. (McConnon delivered the money to Postma.) Scheppa contended that if Calabria was not guilty, he could not be found guilty. The Court held that there was a vital difference between the two defendants from which the jury could find that

> "Calabria was acting, not for, or collaborator with, appellant but as a friend of complainant, believing, however mistakenly, that discretion in compliance would serve better than valor in resistance."

Though it might be said here that the jury *might* have found that McConnon was acting for, with and as collaborator of Postma, the question to be decided is whether under the testimony here, such a conclusion could fairly be reached without appraisal of the motives of McConnon and Postma and their respective relationships to the parties to the labor dispute. We respectfully urge that in

the instant case, as in the *Scheppa* case, motive and relationship must be appraised even though, to be sure, the result of so doing led to affirmance in the *Scheppa* case and here leads to reversal.

Said the Court in *Scheppa*:

> "Complainant testified that he himself, at least for the time, thought that Calabria's persuasions, unlike the similar urgings of appellant, were spoken out of friendship for complainant. We think the case was one where jurors might say, that, of the two defendants who urged complainant to part with his money lest he suffer injury, *one had, and the other did not have, a criminal intent.*
>
> "Although both defendants in the present case came to the garage together and each expressed to complainant the same idea—that harm would befall him if he did not suffer the exaction—nevertheless it cannot be said that the evidence is identical as to the two. *Their relations to complainant were different and the jury could draw different inferences as to their motives.*" (Emphasis supplied.)

The *Scheppa* case reveals a more powerfully incriminating charge of cooperation by Calabria with Scheppa than do the facts here as they relate to McConnon and Postma. The difference in motive and relationship was deemed of vital significance in distiguishing between Calabria and Scheppa, and should be so regarded in evaluating the "cooperation" between McConnon and Postma.

If this Court believes that there was evidence from which the jury could have discriminated between McConnon and Postma, then it must agree that the Court below should have charged the jury to that effect and should not have refused to give McConnon's requested charges, Nos. 16, 26, 27 and 31.

IV.

In addition to the foregoing, we respectfully urge that there was no basis for an inference that McConnon agreed to the *mode* set forth in the indictment by which the *object* of the imputed conspiracy was to be carried out. The mode in this case was either to cause or to continue the strike in order to induce fear upon which the defendants could play to induce consent to pay the money. Even if it can be said that there was agreement upon the object, there is no evidence of an agreement on the mode. The law in this regard is of enduring and ancient authority and should have been applied to this case. The principle was laid down in *Rex* v. *Pollman,* 2 Campb. (Eng.) 229, 11 Rev. Rep. 689, and we earnestly request the Court to consider the application of the principle there announced to the facts in this case. In that case, Watson, a member of a banking partnership, was convicted of conspiracy to obtain an appointment to office for another upon the payment of a sum of money as a bribe. The money was put up with Watson's banking firm and Watson knew that it was to be paid over to secure the appointment. It is plain that Watson cooperated in the illegal act involved, yet his conviction was set aside because, said the Court, *it must be proved*

> "that all the defendants were cognizant of the object of the conspiracy *and the mode stated in the indictment by which it was to be carried into effect.* A contrary doctrine would be extremely dangerous. The defendant Watson must be acquitted." (Emphasis supplied.)

What, we ask, was the object, and what the mode in the instant case? Under the Hobbs Act, the object must be "to obstruct, delay or affect commerce" and the mode must be, "by extortion". Can it be said that McConnon agreed to obstruct, delay or affect commerce? Was it not his object to relieve commerce of the obstruction?

If, on the other hand, the object of the conspiracy is taken to be obtaining money, then the mode must be the inducing of consent in the victim to make the payment "by wrongful use of actual or threatened force, violence or fear". Can it be said that McConnon agreed with Postma to *induce* consent? The evidence is merely that McConnon told Vogel the terms upon which Postma would terminate the strike. We submit that there is no basis for a reasonable inference that McConnon agreed with Postma to induce consent or to coerce the truckers or to continue the strike, and that therefore McConnon should be acquitted.

V.

The newspaper publicity must have been prejudicial to McConnon for even this Court, in sustaining the refusal to exclude witnesses, said that it did so "especially in view of the subject matter of the claim next to be discussed (a news story relating to a threatened government witness)". We respectfully suggest that if this news-story was of especial significance in the mind of this Court in appraising the action of the Trial Judge in refusing to exclude the witnesses, it must have had a special and prejudicial impact on the jury of such force as to be ineradicable by the admonition of the Trial Judge. We respectfully request the Court to rehear the case on this point as well as on all others herein advanced, particularly in the light of the fact that Judge Frank indicated that in his opinion this was error, and because his untimely and lamented death deprived McConnon of the right to have a decision of this Court distilled as a product of discussion and interchange between all of the judges who heard the argument.

VI.

The Court in its opinion held that McConnon, himself a victim of the strike, was guilty with Postma of a conspiracy under the Hobbs Act. We respectfully request the Court to reconsider the result of its decision in the light of the purpose and legislative history of the Hobbs Act as contrasted with the purpose of Section 302(a) of the Taft-Hartley Act. Whereas the Hobbs Act was never intended to embrace an employer-victim, Section 302(a) of the Taft-Hartley Act made it a crime for the employer to pay money to a labor representative. If the view of this Court in this case is correct, then an employer may be guilty, for the same activity, of a violation of Section 302(a) of the Taft-Hartley Act and of a violation of the Hobbs Act, as well. Surely Congress intended no such result. It was because the entire thrust of the Hobbs Act was directed solely against the racketeer and not the acquiescing employer, that Section 302(a) of the Taft-Hartley Act was enacted. We therefore urge this Court to reconsider its holding on this point and conclude that McConnon could not be guilty of conspiring with Postma. In this connection, we point out that where the substantive crime, the extortion in this case, cannot be committed without acquiescence, a conspiracy between the extorter and the victim cannot constitute an indictable conspiracy. Said the Court in *Gebhardi v. U. S.*, 287 U. S. 112:

> "If this (a case involving acquiescence) were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute."

Cf. Hornstein v. Paramount Pictures
292 N.Y. 467, 471, 472.

VII.

We respectfully urge that this petition for rehearing be granted, and that the judgment of the District Court be reversed; or, if this petition should be denied, we respectfully pray for a stay of the mandate and a continuance of bail under Rule 46(a)(2) of the Federal Rules of Criminal Procedure pending an application for a writ of certiorari, which application the petitioner, Joseph P. McConnon, intends to make because of the serious, substantial and important questions involved in this case.

And the petitioner will ever pray, etc.

LIEBERMAN, KATZ & ARONSON,
Attorneys for Petitioner and Defendant-Appellant, Joseph P. McConnon.

On this Petition:
ISADORE KATZ.

Certificate of Counsel

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ISADORE KATZ, being duly sworn, on oath, certifies and says that he makes this certificate in compliance with Rule 28 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

Isadore Katz

Sworn to before me
this 7th day of March 1957
Marshall L. Rosenberg

MARSHALL L. ROSENBERG
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-8650860 Qualified in Queens County

FILED
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JOHN T. FEY, Cl

No. 968

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
MAY 1957

Docket No. 24114

UNITED STATES OF AMERICA,
Appellee,

v.

PETER POSTMA and JOSEPH P. McCONNON,
Defendants-Appellants,

and

NICHOLAS ROBILOTTO,
Defendant.

PETITION FOR REHEARING

To: The Honorable Judges of the United States Court of Appeals for the Second Circuit:

PETER POSTMA, the Defendant-Appellant above named, presents this, his Petition, for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I.

It is evident from the opinion of the Court that the Defendant-Appellant Postma has failed to make himself sufficiently clear concerning Point VII in his Supplemental

Brief. This Point deals with the refusal of the Trial Court to exclude witnesses from the courtroom at the request of the Trial Counsel for Defendant-Appellant Postma.

It is not the contention of the Appellant here that an exclusion of witnesses is a matter of absolute right in every case. We recognize that under the Federal cases cited in the opinion, the exclusion of witnesses is, and always has been in the Federal Courts, a matter of discretion with the Trial Court. We feel, however, that there were factors existing in the case which required the Trial Judge to exercise his discretion in favor of the Defendant Postma's motion.

The two factors which we consider most compelling are the extremely long period of time between the date of the alleged crime and the trial of the action, and the very nature of the charge and the evidence adduced to support it.

Over three and one-half years expired between the last act in the alleged conspiracy and the trial of the action. More than four and one-half years expired between the first act of the alleged conspiracy and the trial of the action, as was pointed out in the opinion of the Court herein. After the expiration of the above time, eight Government witnesses testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. When we consider that the testimony concerned conversations, alleged admissions, shades of meaning, innuendo, and other extremely illusory evidence, it is clearly evident that they should not have been allowed to listen to each other testify.

Since the record is devoid of any evidence that the Defendants-Appellants or any one in privity with them made

any attempt to approach or influence any of the witnesses for the prosecution, a decision based on a fear of such circumstance which seriously prejudices the rights of the Defendants-Appellants would hardly seem proper.

It is, therefore, the position of the Defendant-Appellant Postma not that the Defendant in any proceeding has an absolute right to have witnesses excluded from the courtroom, but rather that under the peculiar circumstances existing in his particular case, the failure to exclude witnesses was an improvident exercise of discretion.

II.

The Court in its opinion and concerning the allusion made by the Trial Court to the scales of justice states as follows:

> "To evalute correctly this claim of error it must be borne in mind that the passage complained of immediately follows full and unexceptionable instructions as to reasonable doubt, the applicable burden of proof, and the presumption of innocence."

The Defendant-Appellant can find no quarrel with the above; indeed, we feel that it is the very fact that the use of the metaphor follows the explanation concerning reasonable doubt, which makes its use particularly damaging. A metaphor is a device used to clarify a concept which is difficult to grasp. Its purpose is to explain in concrete form that which in terminology is confusing. If there is no possibility of confusion, there is no need for metaphor and therefore the very fact of its use speaks eloquently for its importance. If the Jury was led to feel that the Defendant could be convicted on a preponderance of the evidence, surely he has been prejudiced.

III.

Your Petitioner feels that a rehearing is urgently required in the action now before this Court, particularly in view of the untimely death of Judge Frank. It is apparent from the notes contained in the opinion of this Court that Judge Frank had convictions contrary to the other two judges of the Court concerning both of the problems discussed in this Petition. Apparently, in preliminary conference he indicated his feelings to the other members of the Court. We feel that the Defendant-Appellant is entitled not only to the individual opinions of each of the members of the Court but, more particularly, to the wisdom of the Court as a whole arrived at after fruitful discussion and interplay of ideas.

For the above reason your Petitioner feels that a reargument is necessary.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

E. STEWART JONES,
Attorney for Petitioner and Defendant-Appellant,
Office and Post Office Address,
28 Second Street,
Troy, N. Y.

IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

—o—

UNITED STATES OF AMERICA,
Appellee,

vs.

PETER POSTMA and JOSEPH P. McCONNON,
Defendants-Appellants,

and

NICHOLAS ROBILOTTO,
Defendant.

Docket No. 24114

—o—

Certificate of Counsel.

I, E. STEWART JONES, Esquire, attorney for Defendant-Appellant Postma do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

Dated: February 28, 1957.

E. STEWART JONES.

FILED
MAY 9 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1957.

No. 982

UNITED STATES OF AMERICA,
Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,
Petitioner.

Petition of Peter Postma for a Writ of Certiorari.

BARNEY SAMELSTEIN,
Attorney for Petitioner,
28 Second Street,
Troy, New York.

E. STEWART JONES,
Of Counsel.

THE REPORTER COMPANY, INC., Walton, N. Y.—1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

UNITED STATES OF AMERICA,
Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,
Petitioner.

PETITION OF PETER POSTMA FOR A WRIT OF CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

Peter Postma, by his attorney, Barney Samelstein, Esq., respectfully petitions the Court for a Writ of Certiorari to the Court of Appeals, Second Circuit, and in support thereof respectfully shows:

A

The Opinions of the Court Below.

Since the opinions of the Court below have been fully set forth in Appendices A and B of the petition of Joseph P. McConnon, filed herein, we have not annexed same to this petition.

B

The Grounds on Which the Jurisdiction of this Court is Invoked.

The judgment of conviction for conspiracy to violate the Hobbs Act, sought to be reviewed, was rendered and entered by the United States District Court for the Northern District of New York on April 17, 1956. The judgment was affirmed by the Court of Appeals, Second Circuit, on February 21, 1957. A petition for rehearing was filed on March 8, 1957, and denied on April 9, 1957. In the opinion in which rehearing was denied, the Court below stayed its mandate, pending a timely application to this Court for a Writ of Certiorari, and if such be granted, until final dispositive action by this Court; and in the meanwhile bail was continued.

Petitioner believes that this Court has jurisdiction to review the judgment by Writ of Certiorari under Title 28, U. S. C. Sec. 1254(1); Act of June 25, 1948, c. 646, 62 Stat. 928.

The grounds on which the jurisdiction of this Court is invoked are that the Court of Appeals in affirming the judgment has decided that

> (1) The Hobbs Act, despite its vagueness, does not violate the Due Process clause of the Fifth Amendment to the Constitution of the United States. This is a question of federal law not yet, but which should be, settled by this Court;
>
> (2) Under the Hobbs Act, the petitioner, himself an employer-victim of a strike, may be found guilty of conspiring with an extorting labor leader in charge of a strike because, during the strike he acted as intermediary between the labor leader and one of the struck employers, carried messages back

and forth and then, at the request of one struck employer, carried the extortion money to the labor leader. This involves a question of federal law, not yet, but which should be, decided by this Court.

(3) The Trial Court departed from the accepted and usual course of judicial proceedings:

(a) In denying a motion to exclude from the courtroom all witnesses awaiting calls to testify;

(b) In charging the jury, even though by the use of a scales-of-justice metaphor, it supplanted the rule of reasonable doubt with the preponderance of evidence rule;

(c) In refusing to charge the jury to distinguish between the intent, motive and purposes of the petitioner and the intent of the labor leader.

C

The Questions Presented for Review.

1. Is the Hobbs Act so vague and indefinite as to be void for vagueness under the Due Process Clause of the Fifth Amendment?

2. Does the conspiracy provision of the Hobbs Act apply to the petitioner, whose business as an operator of trailerships carrying trucks between Albany and New York, N. Y., was halted by a strike of the truck drivers against trucking companies in Albany, because he acted as intermediary between the struck operators and the extorting labor leader in order to bring about the end of the strike and the resumption of his business?

3. Was there proof of conspiracy?

4. Should the Trial Court have charged the jury that the petitioner could not be found guilty of conspiracy unless it was found that he entered into an agreement with the labor leader with the intent to continue the strike until the struck employers paid money under fear of force or violence or threat thereof?

5. Was it prejudicial error for the Trial Court to deny the motion to exclude from the courtroom all witnesses awaiting a call to testify?

6. By his use of the scales-of-justice metaphor, did the Trial Court, in his charge to the jury, substitute the rule of preponderance of evidence for the rule of reasonable doubt and was this reversible error?

7. In the event that a petition for a Writ of Certiorari is granted herein on behalf of the petitioner McConnon, then the petitioner Postma respectfully requests that the Court grant his petition also, since should the conviction of McConnon be reversed, then the petitioner Postma would have been held to be a co-conspirator in a conspiracy in which he alone was held to be guilty.

D

The Statute Involved.

SECTION 1951, TITLE 18, UNITED STATES CODE

"Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in his section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

E

Statement of the Case.

In an indictment containing a single count of conspiracy, it was charged that from on or about June, 1951, and continuing up to the time of the filing of the indictment, April, 1955, Peter Postma and Nicholas Robilotto, two business agents of a local teamsters' union in Albany, New York, and Joseph P. McConnon "did conspire together • • • to

obstruct, delay and affect interstate commerce * * * by extortion"; that it was a part of said conspiracy that Postma and Robilotto would use their positions in the union to obtain $10,000 from twelve trucking companies by threatening and actually causing work stoppages until the payments were made.

No such conspiracy was proved. At the conclusion of the Government's case, the Trial Court granted a motion to acquit Robilotto. McConnon did not testify. Both Postma and McConnon were found guilty by the Jury.

The Court of Appeals said that they were found guilty of conspiring to interfere with interstate commerce by extorting money "under threat of continuing the strike" which, said the Court of Appeals, "is precisely the conspiracy charged in paragraph 1 of the indictment", though the indictment referred to a conspiracy to cause strikes.

Under cover of the indictment, the Government introduced a great mass of testimony of bitter labor negotiations between the representatives of an association of trucking companies and the local teamsters' union, beginning in June, 1951, when Postma, the chief union negotiator, gracelessly accepted an increase of 13 cents per hour under a wage reopening clause and said, "Next year, when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are in the street, I will jam it down your throat" (58a, 201a, 407a),* and continuing up until the advent of the strike on November 7, 1952, when negotiations for a new contract broke down.

The overwhelming mass of testimony in the case consisted of angry recitations by the employers of the course of these negotiations, the union demands for a new contract which the employers characterized as grossly exorbitant, and the surly manner in which Postma carried on the negotiations.

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* References in parentheses are to the printed Appendix filed in the Court of Appeals and in this Court.

McConnon had not the slightest connection with any of these matters of which the employers complained so bitterly. He was himself an employer who operated Trailerships, Inc., in Albany, New York, which transported truck trailers by ship on the Hudson River (150a).

He was not connected with the teamsters' local union nor was he involved in the labor relations or negotiations between the local union and the trucking employers (180a). He solicited business from the trucking employers and maintained warm, friendly and cordial relations, both socially and commercially, before and after his alleged part in the conspiracy, with John J. Vogel, Jr., a trucking employer, the chief government witness.

The strike of the truck drivers necessarily halted the operations of Trailerships, Inc.

The only significant testimony concerning McConnon was given by John J. Vogel, Jr. On November 13, 1952, on the sixth day of the strike, McConnon, who was as much affected by the strike as the struck trucking employers, came to a table in a hotel bar and grill in Albany where Vogel and Mayberry, another trucking employer, were seated. McConnon talked for a few minutes "about why don't we get the strike settled and his Trailerships were not in operation, he was losing money, and that kind of discussion and, as I recall it, he motioned for John Vogel to go out in the hall, he would like to talk to him" (214a). Vogel went with McConnon into the hallway of the hotel where McConnon said, so Vogel testified, "If you will offer the seven points, and $10,000, that Pete will settle the strike" (74a). The seven points referred to union demands concerning wages and fringe benefits.

Vogel said nothing to McConnon but returned to the table and told Mayberry that Postma wanted the seven points and $10,000 (82a). Vogel testified that he was scared, that he was thinking of other struck operators signing "if and when" contracts to get their trucks rolling,

and that he could not stay in business very long if he had to sign the "if and when" contract (79a). Despite such fears, recited as well by the other employers, Vogel and Mayberry, and Dastoli, another trucking employer who joined them at the table, immediately wrote down the seven points in dispute, prepared a list of truckers and the amounts each might contribute toward the $10,000, and then repaired to the truckers' strike headquarters in the hotel where they discussed the matter with a number of operators who were there at the time (83a-90a). "We told them", said Vogel, "the story of what happened and they were willing to go along with it to get the strike over" (91a). Vogel then told McConnon that the operators would pay the $10,000 and McConnon left.

On the next day, McConnon told Vogel, "Nick (meaning Robilotto) then had got his oar in and they wanted $30,000 instead of ten" (92a), which the truckers refused to pay. On Saturday, according to Vogel, McConnon told Vogel that "Pete and they would then take the $10,000", and that "they wanted a small committee and get a separate room" (96a) for a meeting between three union and three employer representatives. The meeting took place that afternoon. McConnon was not present. According to Vogel, there was talk about a union convention, but no talk about the strike for several hours, when suddenly, "I walked over to one side of the room with Postma", and Postma said, " 'That this town is very small and these operators will talk' and I said nothing, and he finally said to me, 'Well, they are all getting theirs, I am going to get mine' " (102a). Vogel and Postma then returned to their seats and in a very few minutes it was agreed to settle the strike on the seven points consisting of a wage increase of 10 cents per hour and certain fringe benefits.

Immediately after the meeting, Vogel began to collect the various contributions from the other truckers. The next day, Sunday, the union membership at a meeting voted to terminate the strike and the trucks began to roll.

On the following Tuesday, without any prior discussion or arrangements, and at a time when McConnon, as was his wont, came to Vogel's office on business, Vogel gave him $7,500 "and he could take it to Postma" (193a). On the following Tuesday, again without any prearrangement and at a time when McConnon dropped in to see Vogel on business, Vogel gave $2,500 to McConnon for delivery to Postma, together with a list of the contributors. McConnon told Vogel that he had given the money to Postma (114a). Several months later, Postma told Vogel that he had received the $10,000.

Hickey, a Vice-President of the International Brotherhood of Teamsters, testified that about a year later McConnon came to his office in New York and told him about the strike, its effect upon the business of Trailerships, Inc., and that "he became an interested party in trying to solve or settle the strike so the Trailerships could get back in operation" (488a), that he had talked with Postma who agreed that the strike could be settled for a certain amount of money and that he got the money from Vogel and passed it on to Postma (491a).

On this testimony, the Court of Appeals held that "McConnon intentionally and actively *allied* himself with Postma's effort to shake down the truckers;" that "each knowingly *co-operated* in an effort to *coerce* the truckers, through fear of economic consequence of a continuation of the strike, to pay Postma a sum of money for its termination"; that "the mere fact that a continuation of the strike, directly or indirectly, would work economic hardship, directly or indirectly, on McConnon, did not justify his *co-operation* with Postma in committing an illegal act" (Opinion of the Court of Appeals; emphasis supplied).

In its opinion, denying McConnon's petition for rehearing, the Court held that there was no prejudicial variance between the conspiracy charged in the indictment and the alleged conspiracy found lurking in the testimony to

support the verdict of the jury. "It is true," said the Court of Appeals, "that there was insufficient proof to hold Robilotto and as a result *the conspiracy charged was not proved to have existence until McConnon and Postma began to co-operate in a plan involving extortion*" (emphasis supplied).

Referring to petitioner's complaint that the introduction of the testimony of many bitter employers of prestrike events had prejudiced him, the Court said that, "It was admissible as tending to show that Postma, at and prior to the time when his collaboration with McConnon began, was nourishing illegal designs against interstate commerce of which McConnon was aware." This is a most curious statement for there was absolutely no testimony that McConnon "was aware" of any designs, legal or illegal, nourished by Postma against the operators. The testimony was clear that McConnon had no connection at all with any of the activities of the union or with Postma's activities which led up to the strike. He, like the struck employers, was adversely affected by the strike and, with them, entertained fears of economic loss flowing from the strike. If the crux of the case against him is that he co-operated, the evidence is clear that he co-operated in the same manner that Vogel co-operated to bring about a termination of the strike. His motion for a judgment of acquittal should have been granted.

The petitioner unsuccessfully challenged the fairness at the trial of the refusal of the Trial Court to exclude witnesses awaiting calls to testify from the courtroom while other witnesses were testifying; and made several objections to the failure of the Court to charge the jury concerning McConnon's intent and generally excepted to the adequacy of the charge.

F

ARGUMENT.

POINT I

The Hobbs Act is void for vagueness under the due process clause of the Fifth Amendment to the Constitution of the United States.

Though this Court did decide in *United States v. Green*, ... U. S. ....., that the Hobbs Act, 18 U. S. C. Sec. 1951, was a valid exercise of legislative power under the Commerce Clause, it has not yet decided whether the Hobbs Act is sufficiently definite and clear under the Due Process clause to survive its tests. The Court below said, rejecting our argument that the Hobbs Act was void for vagueness,

> "The Supreme Court has not yet dealt with the contentions of the appellants here."

A final determination of this important question is peculiarly necessary at this time in the administration of the Act.

In the instant case, the Court below relied upon its prior decisions, particularly *United States v. Varlack*, 225 F. 2d 665, in which it had said that

> "The terms of the present statute are no more vague than those of its predecessor."

and cited *Nick v. United States*, 122 F. 2d 660, and *Campagna v. United States*, 146 F. 2d 524, which had dealt with the constitutionality of the predecessor Anti-Racketeering Act of 1934, the Copeland Act, 48 Stat. 979-980, 73rd Cong. 2d Sess., under the Commerce Clause. But the Hobbs Act differs in many material and significant provisions from its predecessor. Congressman Hobbs, the author of the present Act, declared, during the debates in the House,

> "The reason we left out Section 6 of the Copeland Act is the same reason we left out every word of the

> Copeland Act. We wiped the whole thing out and substituted a bill that cannot be misunderstood" (91 Cong. Rec. 11,900).

The new Act changed the title of the Copeland Act from

> "an Act to protect trade and commerce against interference, threats, *coercion* or intimidation." (Emphasis supplied.)

to

> "interference with commerce by threats or violence."

The word "coercion" was omitted from the definition of the crime and the gist of the crime was changed to

> "Whoever in any way or degree obstructs, delays or affects commerce * * * by * * * extortion * * *."

Whereas the Copeland Act had defined the word "wrongful", that definition was deleted from the Hobbs Act and now the word "wrongful", pregnant with a variety of meanings, stands undefined in the Act.

Furthermore, the definition of the word "extortion" was changed from

> "obtains the property of another, with his consent, induced by wrongful use of force or fear * * *."

to

> "the obtaining of property from another with his consent induced by wrongful use of *actual or threatened* force, *violence* or fear * * *." (Emphasis supplied.)

The word "coercion" was omitted from the Hobbs Act because of labor representations at the legislative hearings (77th Cong., Apr. and May, 1942) so as to make clear that the Act was directed at interference with the transportation of goods in interstate commerce and was not intended to impair or affect the right to strike or other rights contained in the federal labor statutes set forth in Section (c) of the Act.

The result of the changes was, we submit, to make the Hobbs Act even more obscure and more vague than its

predecessor had been. It does not contain ascertainable standards of guilt so that men of reasonable intelligence may have fair warning of the prohibited activity. It is because the words "affects commerce," "wrongful" and "fear" are so broad, indefinite and variegated in meaning that men of reasonable intelligence can only guess at their meaning in the statute. Because of the lack of precision in this criminal statute, acts thought to be beyond the scope of the federal authority under the Commerce Clause and within state police power are found to be punishable under the Hobbs Act; labor activity deemed to be protected under the federal labor statutes is presented as being wrongful, see dissenting opinion in *United States v. Kemble*, 198 F. 2d 880; and fear of economic loss flowing from strikes is deemed to be the kind of fear envisaged by the Hobbs Act, see *United States v. Varlack, supra*, and cases therein cited.

Moreover, the lack of clarity in the Hobbs Act permits its extension to conspiracies to "continue strikes" as well as to "cause strikes" as in the instant case, and to reach a "shakedown" to stop a strike, even though this very activity was expressly declared to be beyond the scope of the Act. During the course of the debate on the Hobbs bill in the House, Representative Sumner asked:

> "There have been complaints that in the case of strikes, an attorney has gone in and asked an operator for something like $15,000 to $20,000, as a shakedown to stop a strike. Is there anything in the bill about that?"

Mr. Jennings, one of the Managers of the bill, replied:

> "Not a thing. This does not have a thing to do with strikes" (91 Cong. Rec. 11,912).

a. The Term "Affects Commerce" is as Broad as Congressional Power to Legislate but Does Not Describe a Prohibited Act.

The Act makes it a crime to obstruct, delay or affect commerce by extortion. We are at a loss to understand whether the word "affects" is to be read *in pari materia* with the words "obstructs" and "delays" or whether it stands separate and apart from them and means something more than interference with commerce by obstruction or delay. The term "affects commerce" is used by Congress when it wishes to bring aspects of commerce within its constitutional power and connotes the broad reach of that power. It does not, however, offer any clue as to the nature of the prohibited condition of commerce that may not be brought about by extortion without violating the Act. "Affects" means "influence" and commerce may be influenced adversely or beneficially. The Act gives no indication of whether either or both results are prohibited. One may affect commerce by obstructing it, or delaying it, or restraining it, or controlling it, or monopolizing it, or preserving it, or restoring it, or protecting it. In what sense is it used in the Hobbs Act?

Section (c) of the Hobbs Act surely uses the word "affect" in a sense different from its usage in Section (a). In what sense is it employed in Section (a)?

Because of the difficulty in ascribing a definite meaning to the term "affects commerce", the lower Court had held in *United States v. Varlack, supra,* that in a prosecution under the Hobbs Act it is not necessary for the prosecution to prove

> "That it was the purpose of the conspiracy to affect interstate commerce."

This, said the Court, was a matter of law and the only question open to the jury was whether the acts of the defendant constituted extortion. Thus it had become the

practice to try cases under the Hobbs Act as though the crime was the crime of extortion in interstate commerce instead of "affecting commerce by extortion".

Not only does the term "affects commerce" stand undefined in the Hobbs Act but there is no definition of it in any federal act. It is not a term of art and there are no common-law precedents to give it content.

It has been difficult enough for this Court to give meaning to the term "affecting commerce" under the Commerce Clause involving the process of adjusting the interacting areas of national and state authority over commerce.

"Precisely the same kind of issues has plagued the two great English-speaking federations," said this Court in *Polish Alliance v. N. L. R. B.*, 322 U. S. 643; and, "There is no single concept of interstate commerce which may be applied to every federal statute regulating commerce," said the Court in *McLeod v. Threlkeld*, 319 U. S. 491, 495; and "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle", warned the Court in *Kirschbaum v. Walling*, 316 U. S. 517.

If the term is so difficult of definition when it relates to marking out the constitutional boundaries within which Congress may legislate as to plague two nations and to be equivalent to the futile attempt to square the circle, how can it be deemed sufficiently definite and certain to define a crime? Can it be said that the citizen acted at his peril because he could not in advance resolve this great and historic issue which has plagued two nations? Can it be said that a penal statute whose operation turns upon the determination of such a complex issue as the distribution of governmental power between national and state authorities is sufficiently definite and clear to survive the test of the due process clause? We believe not.

"Affecting commerce" is defined in the National Labor Relations Act, Sec. 2(7), in a most unique and singular fashion admirably tailored to the needs and purposes of that Act but wholly inappropriate to the purposes of the Hobbs Act. Despite the highly specialized definition of the term "affecting commerce" in the National Labor Relations Act, the problem of determining whether the unfair labor practices present in each case affect commerce under that Act has continuously troubled the Board and the courts. In that Act Congress made a finding and declared a policy with respect to labor disputes and their effects upon interstate commerce. No such legislative finding is present in the Hobbs Act. Consequently none of the cases decided under the National Labor Relations Act furnish any guide as to the meaning of the phrase "affects commerce" as used in the Hobbs Act. We submit, therefore, that the term "affects commerce" in the Hobbs Act are words which are vague and fluid and "may be as much a trap for the innocent as the ancient laws of Caligula", *United States v. Cardiff*, 344 U. S. 175, 176.

The word "affects" is surely as vague as the word "restrains" and yet it was only because of the common-law meaning attributable to the word "restrains" that the Sherman Act was saved from being held void for vagueness, *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Apex Hosiery Co. v. Leader*, 310 U. S. 469.

The more inclusive phrase in the Hobbs Act, "in any way or degree affects commerce", renders the term "affects commerce" even more vague and indefinite, since no citizen could be possessed of such wisdom as to know whether or not his acts would or would not in any way or degree affect commerce.

b. "Wrongful" as the Critical Word in the Definition of Extortion Has No Clear Meaning.

We noted above that the definition of the word "wrongful" contained in the Copeland Act had been deleted from the Hobbs Act. Some effect must be given to this deliberate excision by Congress of a critically important definition of probably the most crucial word in the definition of extortion in the Hobbs Act. In *Callanan v. United States,* 223 F. 2d 171, the Court ascribed to the word "wrongful" the same definition which had been stricken by Congress and held that despite the omission, Congress did not intend to change the meaning of the word as defined in the Copeland Act. What was easily determined by the Court in the *Callanan* case presented great difficulties to the dissenters in *United States v. Kemble, supra,* in which the dissenters held that the word "wrongful" is not a "term of strong art in the criminal law" and that it includes both public and private wrongs.

"Wrongful" as used in the Hobbs Act is the very essence of the definition of extortion. If this word is obscure, ambiguous or vague, it cannot be said that there is no difficulty in distinguishing the licit from the illicit and hence the statute must fall as a denial of due process.

The test to be applied is the intelligence of common men. It will not do to say that a man of common intelligence knows what "wrongful" means any more than it is proper to say that such a man knows what the word "sacrilegious" means. "Wrongful" is surely as vague as "sacrilegious" which was explored in *Burstyn v. Wilson,* 343 U. S. 495, in an exhaustive search to find its meaning. To search for the meaning of the word "wrongful" must be far less rewarding than a search for the meaning of "sacrilegious" for that which is "sacrilegious" is subsumed under the more inclusive concept of the "wrongful".

The term "wrongful use" in the Hobbs Act is no more definite than the term "unjust rate". Both invite use of

moral concepts and are equally deficient under the requirements of the due process clause. See *United States v. Cohen Grocery Co.*, 225 U. S. 81.

The phrase "without just cause or legal excuse", a phrase commonly used in tort law, was held to be too vague in *Thornhill v. Alabama*, 310 U. S. 88. The words "wrongful use" are surely no more certain than the phrase "lawful occupation" at which this Court looked askance in *Lanzetta v. New Jersey*, 306 U. S. 451, while it struck down the statute on the ground of vagueness and ambiguity because of the use of the word "gang",—a word possessed of a variety of meanings.

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States v. Cardiff, supra.*

Precisely in point is *International Longshoremen & Warehousemen Union of America v. Ackerman*, 82 F. Supp. 65, 104-106, in which a criminal conspiracy statute of Hawaii was held to be unduly vague because of its use of the word "wrongful".

Likewise in *United States v. Reese*, 92 U. S. 214, a statute penalizing the *wrongful* refusal of an election officer to receive a ballot was declared to be void for vagueness. Said the Court:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large."

Section (c) of the Hobbs Act compounds the difficulty. That Section reinforces the labor laws, including the National Labor Relations Act, and that Act sets forth many wrongful acts by labor unions. For example, if a union failed to send the strike notices required by Sec. 8(d) of

the National Labor Relations Act, a strike for higher wages is unlawful and the employer may discharge the strikers. Such a strike could well be deemed to be a wrongful use of threatened force or fear and in violation of the Hobbs Act. Again, a strike is unlawful under the National Labor Relations Act if its purpose is in violation of the secondary boycott provisions of that Act. Would such a strike be a wrongful use of actual or threatened fear under the Hobbs Act?

c. The Meaning of the Word "Fear" Cannot Be Ascertained From the Statute.

The word "fear" is so broad as to be another copacious net such as that condemned in the *Reese* case, *supra*. Fear of what? Unlike the New York statute, Penal Law, Section 851, which defines "fear," the Hobbs Act does not declare the kinds of fear which constitute extortion. During the course of the legislative debates it was repeatedly said by the Managers of the bill that it was intended to fashion the Hobbs Act upon the New York Extortion Statute. But the New York definitions were not included in the Hobbs Act. As a result, and despite the omission of the word "coercion", which had been contained in the Copeland Act, the courts are extending the Hobbs Act to include fear of economic loss whereas it would appear that the Hobbs Act was directed only at fear of force or violence.

This Court seems to us to have at least intimated in *United States* v. *Green, supra,* that the Act does not embrace every kind of fear but rather relates to fear of force or violence alone. This Court, in speaking of the Hobbs Act, said that it was a statute which struck at labor officials who attempt "to get personal property through threats of force or violence."

In showing the relationship between the Hobbs Act and its predecessor, this Court said,

> "The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out of state truckers by threats and violence. *The Hobbs Act was meant to stop just such conduct.*" (emphasis supplied)

We think it is significant that in footnote 7 in the *Green* case, this Court omitted reference to those cases such as *U. S.* v. *Varlack, supra; Bianchi* v. *United States*, 219 F. 2d 182, cert. den. 349 U. S. 915; *Hulahan* v. *United States*, 214 F. 2d 441, cert. den. 348 U. S. 856; *Callanan* v. *United States*, 223 F. 2d 171, cert. den. 350 U. S. 852, reh. den. 350 U. S. 926; in which cases several Courts of Appeals had held that the Act was broad enough to include fear of economic loss as well as fear of force and violence or threats of force or violence. The only case under the Hobbs Act of which this Court took notice in the *Green* case was *United States* v. *Kemble*, 198 F. 2d 889, in which the fear arose because of force and violence. We think the omission of these cases suggests that these cases in the view of this Court extended the ambit of the Hobbs Act. We refer to these cases to show that the word "fear" is too flexible for use in a criminal statute.

Since the word "fear" is so vague, broad, ambiguous and indefinite as to embrace fear of economic loss, though such fear does not seem to be included within the Hobbs Act, we respectfully submit that the use of the word "fear" in the Hobbs Act renders the Act void for vagueness.

In sum then, we submit under this Point that the Hobbs Act contains words and phrases which are so vague, indefinite and uncertain in their meaning that the statute must be stricken down as violative of the due process clause of the Fifth Amendment.

If this Court is of the opinion that the statute is not unconstitutional under the Due Process clause, then we submit that it should be so construed as to exclude fear of economic loss and be limited to fear of actual force and violence or threats thereof.

POINT II

Since the substantive crime of the Hobbs Act cannot be committed without cooperative action, there can be no indictable conspiracy under that Act between McConnon and Postma.

Assuming in this point, *arguendo* only, that McConnon did agree with Postma to affect interstate commerce by extortion, or, to state it as the Court below did in its opinion denying the petition for rehearing, that they agreed to interfere with interstate commerce by extorting money under threat of continuing a strike, we submit that such an agreement between extorter and victim does not constitute an indictable offense under the Hobbs Act. There can be no conspiracy between extorter and victim under the Hobbs Act, which makes the substantive crime depend upon cooperative action, any more that there can be an indictable conspiracy between the raper and his under-age acquiescent victim. Said this Court in *Gebhardi* v. *United States*, 287 U. S. 112:

> "If this (a case involving acquiescence) were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute."

It is beyond dispute that McConnon was himself a victim of the strike; his business, like that of Vogel and the other operators, had been interrupted by the strike. He, like Vogel and the other operators, was under the same economic pressure to get the trucks rolling. His purposes and motives were the same as those of the truck operators. Pressure upon them was pressure upon him. The situa-

tion here is analogous to that in *United States* v. *Campagna,* 146 F. 2d 524, in which operators of cinema-theatres were subjected to strikes, violence and threats, and this pressure led immediately to pressure upon the distributors of the motion pictures who were in vertical industrial relationship to the operators. There was no direct pressure, violence, threats or other interference with the employment relations of the distributors. It was the distributors who paid the extortion money in Campagna. Surely this Court would not countenance the inclusion in that conspiracy of the distributors who collected the extortion money and turned it over to the extorters! Although McConnon did not contribute a share of the money paid over, McConnon "cooperated" as the medium by which his industrial allies paid over the money just as Vogel also cooperated by collecting the allocated shares of the extortion money from the other struck employers. The government did not indict Vogel, no doubt because of the legal principle set forth in the *Gebhardi* case. It should not have indicted McConnon for he, like Vogel, could not be found guilty of conspiracy with Postma in violation of the Act because he had "cooperated" with Postma in committing an illegal act.

Moreover, during the course of the legislative debate on the Hobbs Act, Congressman Hobbs stated on the floor of the House that the definition of extortion contained in the Bill had been construed many times and "comes from the New York Code" (91 Cong. Rec. 11,900). The New York Act was never intended to embrace an employer-victim. The New York Court of Appeals so held in *Hornstein* v. *Paramount Pictures,* 292 N. Y. 467, 471-472. Since the Hobbs Act is the federal counterpart of the New York Extortion Statute, it must be concluded that the Hobbs Act like the New York Extortion Act does not include the employer-victim within its scope.

In addition, the entire thrust of the Hobbs Act was against the extorting racketeer and not against the

acquiescent employer. The course of the debates in Congress makes this abundantly plain. It was not until Section 302(a) of Labor Management Relations Act, 1947, was enacted that it was made a crime for an employer to pay money to a labor representative. If the view of the Court below is correct with respect to conspiracies in violation of the Hobbs Act, then an acquiescing employer who cooperates with a labor racketeer by paying money over to him to bring a strike to an end may be found quilty for the same activity of a violation of the Hobbs Act as well as of Section 302(a) of the Labor Management Relations Act, 1947. We submit that Congress intended no such result and that the Hobbs Act should be so construed as to exclude McConnon, an employer-victim of Postma's activity, from its scope.

POINT III

There was no proof of a conspiracy between McConnon and Postma.

The indictment alleged a conspiracy between Postma and Robilotto, the two business agents of the local union, and McConnon which originated in a statement made by Postma in June, 1951, that when the labor contract expired in 1952 he, Postma, would present a proposal to the operators that they could accept and "when you are in the street, I will jam it down your throat." At best, this was a threat to force a strike more than one year later. It cannot be deemed to be a threat to obstruct, delay or affect interstate commerce *by extortion.* Nevertheless, under the pretext that this statement in June, 1951 was the point of origin of an unlawful conspiracy, the government introduced over objection, in repetitive fashion, through a succession of bitter witnesses, a mass of highly inflammatory testimony of exacerbated contract negotiations in which the union prepared and presented ex-

cessive demands through the dominant and domineering Postma,—all of which testimony was calculated to, and did, arouse the passionate hostility of the jury. When the government rested it was abundantly clear that Robilotto was involved in no conspiracy as charged in the indictment. He was therefore acquitted on motion by the Trial Court. There remained then only Postma, the sole "conspirator" with whom McConnon could have joined as "co-conspirator".

It is now said by the Court below that the conspiracy was not the one alleged in the indictment. At the trial, however, the government and the Trial Court tried the case on the theory that there was a pre-existing conspiracy between Postma and Robilotto in which McConnon joined after the strike began. There was no such conspiracy for McConnon to join.

The Trial Court refused to acquit McConnon on the theory that "a man becomes a conspirator or a member of a conspiracy or makes a plan which is only in one man's mind and becomes a conspiracy when he has knowledge of it and with a wilful, deliberate, affirmative act upon his part furthers it" (518a). Since McConnon did not testify or offer any testimony, the case against him stood as it did when the government rested and McConnon moved for an acquittal. At this point, it was plain, as the Court of Appeals said in its opinion denying the petition for re-hearing:

> "that there was insufficient proof to hold Robilotto and as a result, *the conspiracy charged was not proved* to have existence until McConnon and Postma began to cooperate in a plan involving extortion." (Emphasis supplied)

The search for the existence of a conspiracy led the Court of Appeals to the conclusion that the only "conspiracy" which could be found to support the judgment came into existence when McConnon and Postma began to cooperate after the strike began. Neither the govern-

ment nor the Trial Court had viewed this cooperation, as the Court of Appeals put it, to be the conspiracy set forth in the indictment. The charge to the jury did not point to this as the conspiracy of which McConnon was accused. Instead the Trial Judge instructed the jury that it could find that McConnon joined a pre-existent conspiracy. Said the Trial Judge in his charge

> "• • • an individual becomes a member of a conspiracy by his intentional participation in it or in his conscious, active cooperation in the furtherance of its purpose. It is not necessary that he be its creator or co-author but it is sufficient if he adopts it as his own. Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership. But it is his knowledge of a wrongful scheme or plan and the intentional participation in it in the furtherance of its objective. (747a-748a)
>
> • • •
>
> "The government contends that in pursuance of this alleged plan or conspiracy that McConnon made or transmitted a demand, or a request, to the effect that the strike could be settled upon the giving of certain points and the payment of $10,000.00.
>
> "The government contends that Mr. McConnon with his knowledge of the existence of the plan or scheme to extort money wilfully, deliberately and knowingly allied himself with it, took an affirmative step to the consummation of the plan.
>
> • • •
>
> "The government claims that Postma, as I understand it, was a member and he allied himself within—with that scheme or plan over a period of time whereas McConnon joined at a later date." (756a)

Plainly the charge to the jury referred to a pre-existent conspiracy which the Court of Appeals now finds did not exist.

It was only after the jury returned its verdict and the case was on appeal that the government suggested that

the conspiracy consisted of the cooperation with Postma by McConnon. If this be the conspiracy relied upon to support the judgment of conviction, then, we submit, there was a grossly prejudicial variance between the indictment and the proof. But more than this, there is no evidence to support the conclusion that there was any agreement between McConnon and Postma. Without an agreement there can be no conspiracy.

Contrary to the opinion of the Court below, there was no evidence that McConnon and Postma "each knowingly cooperated in an effort to coerce the truckers". McConnon did not cooperate in any act of coercion. We note parenthetically at this point that the word "coercion" which had been contained in the Copeland Act, had been deleted from the Hobbs Act. No one testified that any act of McConnon was coercive.

Though the Court below sustained the conviction of McConnon it did so not because there was proof of a conspiracy but rather, as it said, because "McConnon intentionally and actively allied himself with Postma's effort to shakedown the truckers", and because of "his cooperation with Postma in committing an illegal act",—in short, because McConnon aided and abetted Postma in committing the substantive offense defined in the Hobbs Act. This cooperation might have been sufficient to sustain a conviction of McConnon as a principal with Postma had they been indicted for violation of the substantive crime; but this lately conceived theory of the case cannot serve to convict Postma. One who aids and abets the commission of a substantive offense may himself be convicted as a principal *but not as a conspirator*. The commission of the substantive crime as an aider, abettor or counsellor is a crime separate and apart from the commission of the crime of conspiracy. In *Pereira* v. *United States*, 347 U. S. 1, 11, the Court said:

> "Aiding, abetting and counselling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act regardless of the existence of a conspiracy. * * * Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

We submit, therefore, that the Court below erred in holding that Postma was properly convicted of conspiracy upon proof that he aided and abetted Postma in committing an illegal act.

POINT IV

By the use of the scales-of-justice metaphor in his charge to the jury, the Trial Court misled the jury to believe that the Government need only prove its case by a proponderance of the evidence rather than beyond a reasonable doubt.

In the course of the charge to the jury, the trial judge charged the jury on the burden of proof and reasonable doubt and the presumption of innocence. This was immediately followed by an explanation of a method whereby the jury could weigh the evidence and "determine whether or not the evidence produced by the government has established the violation". He then made use of the scales metaphor and said

> "if you determine that the total of the evidence *inclines the scales* to the contention of the Government, then you *would say*, or attach to that evidence, you *could say* it was more weighty and it would be up to you to determine whether or not it is of the character that dispels in your mind any reasonable doubt.

> "If, on the other hand, in weighing the evidence the scales are evenly balanced, or they *incline* to the defendants' contention, then you would say that the Government has not borne, carried the weight of the evidence as to the particular item of evidence under consideration, or as to the case as a whole, if you are considering the case as a whole." (750a-751a) (Emphasis supplied)

Judge Frank, who heard argument as a part of the Court of Appeals and participated in the decision but died before the opinion was written, indicated in an informal conference memorandum a disposition to reverse on this point as well as upon another point discussed in our next and final point. It was his view, as it is ours, that the use of the scales metaphor indicated to the jury a modification of the earlier instructions as to the burden of proof and left it with the impression that a bare preponderance of the evidence would suffice to convict.

The Court below, consisting after Judge Frank's death of Clark, Chief Judge, and Hincks, Circuit Judge, said "in a criminal case, an instruction using the scales metaphor is seldom helpful and usually undesirable but that in the context of the full charge given in this case, we think no fatal misunderstanding resulted." The Court of Appeals sought to show that despite the undesirability of the use of the scales metaphor and despite its lack of helpfulness, a rational analysis of the charge shows that the charge on reasonable doubt remained unimpaired. We submit, however, that it is not a question of whether a printed copy of the charge can be evaluated and analyzed to show that it "gave the impression that to convict it was necessary that the Government's evidence not only should be 'more weighty' but also that it must satisfy every reasonable doubt," but rather whether such a metaphor in a charge to a jury does not have such impact on the jury as to override general instructions of reasonable doubt. Indeed the

function of the metaphor is to make clear that which might be too subtle for easy understanding and to give concreteness to the abstract and the general. The tendency of the metaphor is to supplant the general statement it was used to explain.

If, by the use of the scales metaphor, there was a misdirection which the jury might have followed, the error was prejudicial and the judgment should be reversed. We respectfully submit that the jury was misled by the metaphor and that this error was so prejudicial as to require a reversal of the judgment.

POINT V

The Trial Court erred in denying the motion to exclude from the court room witnesses awaiting calls to testify.

At the beginning of the trial and before any testimony was taken, a motion was made that all witnesses awaiting calls to testify should be excluded from the courtroom. The basis for the motion was, as stated by counsel for one of the defendants, that there were in the courtroom a large number of individuals named in the indictment as witnesses and that their testimony would no doubt be repeated. The motion was made, said counsel, so that, "We won't have a parroting of testimony." The motion was denied, the Court stating, that he had no reason to believe that the witnesses in this case would parrot testimony any more than in any other case.

As stated in the opinion of the Court below, Judge Frank indicated an inclination to reverse because of this ruling. The Court, however, held that the ruling complained of was not erroneous on the ground that the exclusion of witnesses is a matter for the sound discretion of the Trial Court.

We respectfully submit that in this particular case the rule of exclusion invoked by the defendant should have been granted. Wigmore advocates the rule of exclusion as a right, 6 Wigmore, Evidence, Sec. 1839 (3rd Ed., Supp. 1955).

The circumstances surrounding this case were such that sound discretion dictated that witnesses awaiting calls should be excluded. Over three and a half years had expired between the last act of alleged conspiracy and the trial. More than four and a half years had elapsed between the first act of the alleged conspiracy and the trial. It was apparent from the nature of the indictment which comprehended matters occurring over such a long span of time that witnesses could not remain uninfluenced if they heard testimony of other witnesses of events which transpired years ago. Eight government witnesses and a lawyer testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. It was quite apparent that the anticipated parroting had occurred.

The testimony concerned conversations and admissions and involved shades of meaning, innuendo and extremely illusory evidence of an emotional nature. Witnesses recited their fears when they heard of the money demand in almost similar fashion as though they were fulfilling a necessary ritualistic incantation of the requirements to secure a conviction.

We submit that if, as the Court of Appeals below held, exclusion of witnesses in a case such as this is a matter for the sound discretion of the Trial Court, and not a matter of right, discretion was abused in this case.

In further support for the application of the discretionary rule of exclusion, the Court below reinforced its views by reference to the incident involving a news story

relating to a threatened government witness, implying that exclusion of witnesses might have subjected them to threats from the defendants. The record in this case contains no evidence that the defendants or any one connected with them made any attempt to approach any of the witnesses or to influence them.

The decision of the Court of Appeals implying that a denial of the motion to exclude witnesses is properly based upon the belief that witnesses will be protected thereby and justice better served is hardly compatible with the necessity of affording a fair trial to the defendants.

POINT VI

Since the indictment herein charges the crime of conspiracy to commit a violation of Section 1951 Title 18, United States Code commonly known as the Hobbs Act, should the petition of Joseph P. McConnon be granted, the defendant Postma would have been convicted in a conspiracy of one: Therefore, your petitioner respectfully requests that in the event the petition of Joseph McConnon is granted, the petition of Peter Postma be also granted.

POINT VII

Your petitioner feels that a review is urgently required in the action now before this Court, particularly in view of the untimely death of Judge Frank. It is apparent from the notes contained in the opinion of this Court that Judge Frank had convictions contrary to the other two judges of the Court concerning both of the problems discussed in this petition. Apparently, in preliminary conference he indicated his feelings to the other members

of the Court. We feel that the petitioner is entitled not only to the individual opinions of each of the members of the Court but, more particularly, to the wisdom of the Court as a whole arrived at after fruitful discussion and interplay of ideas.

For the above reason your petitioner feels that a review is necessary.

And the petitioner will ever pray.

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QUESTIONS PRESENTED

1. Whether a business man affected by a strike could properly be found guilty of conspiracy with a union official to violate the Hobbs Act by reason of his participation in extorting personal tribute as a condition of settling a strike.

2. Whether there was a fatal variance between the conspiracy charged in the indictment and the proof.

3. Whether the trial court committed reversible error in denying a motion to exclude from the courtroom witnesses waiting to testify.

4. Whether the court's use of a scales-of-justice metaphor in its charge had the effect of incorrectly stating the doctrine of reasonable doubt.

5. Whether the Hobbs Act is unconstitutionally vague.

STATUTE INVOLVED

18 U. S. C. 1951 provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened

force, violence, or fear, or under color of official right.

STATEMENT

A one-count indictment in the United States District Court for the Northern District of New York charged that, from June, 1951, and continuing up to the date of the indictment, petitioners Postma and McConnon, one Robilotto, and others, conspired to interfere with interstate commerce in violation of 18 U. S. C. 1951 by extorting money from eleven named truckers under threat of continued employee work stoppages (R. 3–4). After trial by jury, petitioners were found guilty[1] (R. 771). Petitioner Postma was sentenced to serve a term of four years, and petitioner McConnon, a term of eighteen months (R. 777, 778). The Court of Appeals affirmed, although Judge Frank, who died before the opinion was filed, had in conference indicated disagreement on some issues (McConnon Pet. 35).

The evidence produced at the trial established the following facts:

Petitioner Postma was at the time of the alleged conspiracy a business agent and vice-president of Local 294 of the Teamsters Union in Albany (R. 22). Truckers in the area testified that Postma, concluding a wage bargaining session with their association in 1951, threatened, "Next year when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are out in the street, I

[1] Robilotto was granted a judgment of acquittal during trial on the ground that there was insufficient evidence against him (R. 501–514).

will jam it down your throat" (R. 58). The following year, Postma, negotiating for the union, demanded a then unprecedented increase of a dollar an hour—forty-four cents on wages, together with pension fund and other fringe benefits (R. 60–63). Counter-offers by the truckers were rejected (R. 63–66). At a meeting on November 7, 1952, the truckers offered ten cents an hour in a five-point offer, each point being one of the categories in a seven-point package deal demanded by the union (R. 68–69). Postma unexpectedly stalked angrily out of the meeting indicating that negotiations might as well start from the beginning, and that the truckers would find out the meaning of his act (R. 69, 208–209, 265–266). That evening a strike began (R. 69, 209).

Petitioner McConnon was head of Trailerships, Inc., a concern which carried truckers' trailers by boat from Albany down the Hudson River to New York (R. 24, 588). On November 13, 1952, McConnon approached one of the truckers, John Vogel, Jr., who with another trucker was at a grill in a hotel which had become strike headquarters for the truckers (R. 72). McConnon asked, "When are you going to get the strike over with?" Vogel answered that the truckers did not know. McConnon left, then came back and asked Vogel to go with him out into the hallway. Once in the hallway, McConnon said to Vogel, "If you will offer the seven points and ten thousand dollars, that Pete [Postma] will settle the strike" (R. 73). Vogel testified that hearing this from McConnon frightened him—that he thought of other truckers who had

signed "if and when" contracts[2] and the ruinous result to his business if he were forced to do so (R. 79). Vogel returned to the restaurant table and told his companion of the offer tendered by McConnon (R. 83). The two men discussed the situation (R. 221) and then drew up a list of truckers and the amounts which each might contribute toward raising the ten thousand dollar amount (R. 86–89). They then went up to the room where the truckers had set up headquarters and discussed the offer with the operators present, who in order "to get the strike over" were willing to go along with the plan (R. 91). Shortly thereafter Vogel went downstairs and told McConnon that the truckers would pay the ten thousand dollars (R. 91–92).

On the following day, McConnon called Vogel at strike headquarters and asked that he meet him in the lobby of the hotel. There he told Vogel that "Nick [Robilotto] had put his oar in" and "they wanted thirty thousand dollars instead of ten" (R. 92). Vogel went upstairs to headquarters, told the truckers of the new demanded sum and received their assurance that they were "not going to go for it" (R. 94). This he told

[2] An "if-and-when" contract is signed by a trucker who, in return for his individual immunity from the strike, agrees with the union that he will be liable for all the obligations under the collective bargaining agreement if and when it should be finally arrived at (R. 210–211). If all the truckers sign such contracts, they have in effect agreed to the original proposal of the union negotiators (R. 188, 211). On the other hand, to hold out against such a contract subjects a trucker to ruinous competitive pressure from other truckers who have signed (R. 211).

McConnon in the lobby. McConnon said he "would go back and tell them" (R. 95). The next afternoon, McConnon again called Vogel and asked that he meet him in the hallway of the hotel (R. 95–96). There McConnon stated that "Pete and they" would take the ten thousand dollars, that for the final negotiations, they wanted a small committee and a separate room and that they did not want the truckers' chief spokesman, a former judge, present (R. 96).

That afternoon Postma with two union representatives and Vogel with two truckers met and for two and a half hours talked only of other matters (R. 100). Then Vogel walked over to one side of the room with Postma where Postma said to him "This town is very small and these operators will talk. * * * Well, they are all getting theirs. I am going to get mine" (R. 102). Thereafter, the two men rejoined the group (R. 102) and Vogel asked if the seven points were acceptable (R. 101).[3] Postma said "Yes" and that he would call a meeting of the union for the following morning (R. 101). On this note, after approximately two minutes of negotiation, the meeting ended (R. 102). The trucks started operating the following night (R. 102).

Vogel collected various sums of money from various truckers (R. 104–106). Two days after the end of the strike, he paid McConnon seventy-five hundred dollars in cash (R. 106). McConnon was given a list of the truckers who had contributed to the sum after he stated that "Pete" [Postma] wanted one (R. 106-

[3] The seven points as accepted included the ten cent wage increase offered by the truckers.

107). The next day McConnon returned with a five-hundred dollar bill and said that "Pete" wanted smaller bills (R. 108). Vogel could not break it and suggested that McConnon try a bank (R. 109). A week later, Vogel gave McConnon the remaining twenty-five hundred dollars in cash together with a final list of the contributors (R. 110–112). McConnon told Vogel that he had paid both sums to Postma (R. 112, 114).

Postma and his witnesses testified generally as to the legitimate character of the strike vote and negotiations (R. 522–678). Postma denied that he conspired to extort (R. 625, 653) or that he ever received any money from McConnon (R. 652). McConnon offered no evidence (R. 679).

ARGUMENT

1. Petitioners contend (McConnon Pet. 21; Postma Pet. 21), as they did below, that the evidence is insufficient to show a conspiracy to violate the Hobbs Act (*supra,* p. 2). They argue that McConnon was a victim of the strike, and that an agreement between extorter and victim does not constitute an indictable offense under the Hobbs Act. They argue that McConnon's status was like that of his customers, the truck operators, pointing out that as his business was likewise interrupted by the strike, he was motivated by the same economic pressures to get the trucks rolling. This argument misconstrues the nature of the offense which petitioners conspired to commit. It is immaterial that McConnon may have been affected by the strike, for it was not the strike, legal in itself,

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that constituted the criminal act prohibited by the statute. It was extortion, the use of the power to call and end strikes for personal gain, that was the gist of the crime. *Nick* v. *United States,* 122 F. 2d 660 (C. A. 8), certiorari denied, 314 U. S. 687; *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8), certiorari denied, 349 U. S. 915. McConnon was obviously not a victim of this conspiracy to extort. He made no contribution to the fund. Whatever his motive, McConnon actively joined in and aided Postma's plan to use his power as a labor leader to get money from the truckers for Postma's personal benefit. He thus had the intent to bring about the acts which violate the Hobbs Act.[4] His participation in the extortion scheme marks him as a conspirator.[5] See *Direct Sales Company* v. *United States,* 319 U. S. 703, 713.

The evidence clearly supports the verdict that petitioners did illegally conspire in violation of the statute. The facts, reviewed above, *supra,* pp. 3–7, show that during the progress of the strike McConnon approached a trucker, and, in a clandestine manner, informed him that Postma would settle the strike on the truckers'

[4] In this regard, the fallacy of petitioner McConnon's argument that the trial court erroneously refused to charge as to his motivation and relationship (Point IV, McConnon Pet. 27) becomes apparent. The court's charge, which instructed that "an individual becomes a member of a conspiracy by his intentional participation in it, or in his conscious, active cooperation in the furtherance of its purpose" (R. 747–748) and which repeatedly pointed out that the guilt of the defendants must be considered separately (R. 758–759, 763, 764), was sufficient.

[5] The question of personal benefit is immaterial. This Court held in *United States* v. *Green,* 350 U. S. 415, 420, that extortion, as defined in the Hobbs Act, in no way depends upon a direct benefit.

terms on the payment of $10,000. They show a second surreptitious approach by McConnon with a message that "they wanted thirty thousand dollars instead of ten." They show that the truckers agreed to pay the ten thousand dollars under fear of economic ruin and that the money which they collected toward the demanded sum was turned over in cash payments to McConnon. This evidence is supported by the circumstances relating to the end of negotiations—the incriminating aside remarks made by Postma to the trucker who had been contacted by McConnon, the attempt to feign the time of negotiation and the actual rapidity with which the truckers' terms, formerly flatly rejected by Postma, were accepted. The fact that the existence or an agreement to exact tribute is inferred does not render the evidence insufficient. Proof of a conspiracy by its very nature must be circumstantial. *Direct Sales Co.* v. *United States, supra,* 319 U. S. at 714. The common purpose and plan of the petitioners is inferred from a "development and a collocation of circumstances." *Glasser* v. *United States,* 315 U. S. 60, 80.

2. Petitioners urge, as they did upon their petition for rehearing, that there is a fatal variance between the proof and the indictment (Pets. 26). However, as the court below pointed out (McConnon Pet. 49), the conspiracy proved fell within the period charged which was "[f]rom on or about June, 1951, and continuing up to and including the date of the filing of this indictment." It is immaterial that, because there was insufficient proof to hold Robilotto, the conspiracy charged was not proved to have existed until McConnon and Postma joined together in their extortion

plan. Only a restricted interpretation of the language of the indictment so that "to cause work stoppages" does not comprehend a continuation of a work stoppage once commenced could justify petitioner's position. The court below properly refused so to read the indictment.

Declarations and activities of Postma in 1951 prior to his collaboration with McConnon were properly admissible to show illegal design and *modus operandi* of which McConnon became aware. See *Heike* v. *United States,* 227 U. S. 131, 145; *United States* v. *Witt,* 215 F. 2d 580 (C. A. 2), certiorari denied *sub nom. Talanker* v. *United States,* 348 U. S. 887; *United States* v. *Compagna,* 146 F. 2d 524, 530 (C. A. 2), certiorari denied, 324 U. S. 867. Nor was the charge of the court with respect to McConnon's later alliance (R. 756) prejudicial in this respect. The evidence showed there was an existing plan and the charge consistently referred to "knowledge of a wrongful scheme or plan" (R. 748), "pursuance of this alleged plan or conspiracy" (R. 756), or "knowledge of the existence of the plan or scheme" (R. 756).

3. Petitioners contend that the trial court erred in denying a motion to exclude from the court room witnesses waiting to testify (McConnon Pet. 33; Postma Pet. 29; R. 19).

The reason for the denial of the motion appears on page 7 of the record where the court, in addressing the jury, said:

> Now one other thing, in this courtroom, as in most of our upstate courthouses, the place is pretty crowded. We don't have any places for jurors, or lawyers, or witnesses, that is, no spe-

> cial place for them. Jurors are thrown in contact with counsel and witnesses, especially out there in the hall.

Faced with this practical necessity, it is understandable that the trial court, in the exercise of its discretion, properly decided to allow the witnesses to remain in the courtroom. This was especially appropriate in the light of the trial court's concern with the news story relating to a threatened government witness (R. 341–355). As the court below pointed out (McConnon Pet. 43; 242 F. 2d 488, at 494, fn. 5), it is well established by a long and unbroken line of federal cases that the exclusion of witnesses is a matter for the sound discretion of the trial court. See also *Holder* v. *United States*, 150 U. S. 91.

Moreover, no prejudice has been shown; the strongest testimony was that of Vogel and no other witness was in a position to testify with respect to the most incriminating parts of Vogel's testimony. Of the succeeding government witnesses, one corroborated Vogel's testimony that he was approached by McConnon at the time of the illegal demand (R. 214); another testified to a later admission by McConnon (R. 489). Three of the truckers who followed Vogel to the stand supplied only testimony as to the varying sums supplied by them and assurances of their fear of economic ruin (R. 355, 377, 397), matters with respect to which there could be no "parroting." True, there was substantial agreement by some of these witnesses as to Postma's threats made in 1951 (R. 201, 261, 307, 407) and as to his conduct in a general way at negotiation sessions (R. 209, 226, 266, 273, 314,

417) but no inference of unreliability can be drawn from this.

4. The court gave full instructions as to the burden of proof, the meaning of reasonable doubt, and the presumption of innocence which, it stated, "exists unless and until you are satisfied in your review of the evidence that the guilt of either or both defendants have been established beyond a reasonable doubt" (R. 749–750). Continuing in language suggestive of the supplementary nature of his later remarks, he began (R. 750), "* * * following that statement of those two rules [i. e. reasonable doubt and presumption of innocence] I think perhaps it would be *logical* if you would say to me, 'Well, how do I weigh evidence; * * *.'" Thereupon he told the jury that he could give them no magical formula, but that he could call attention to several things which they may consider in determining the weight to be accorded a particular bit of testimony, or to evidence, offered by the witnesses. He noted that weight of evidence was not to be governed by the number of witnesses but by conviction and then gave the scales-of-justice analogy to which no exception was then taken, but which both petitioners now claim was erroneous (McConnon Pet. 31, Postma Pet. 27).

When the language is read in context, in logical sequence, it gives no impression of contradicting or modifying the instruction as to reasonable doubt. Rather, the court's illustrations of the things which the jury might take into consideration in determining the weight of items of evidence suggest that the metaphor was primarily intended as an aid to the jury in deter-

mining credibility. In any event the instruction complained of makes it clear that even if evidence in favor of the Government is "more weighty", it still requires a determination of whether it is of the character to dispel any reasonable doubt, and that if it is evenly balanced or inclined toward the defendants, the Government has not carried the weight of evidence, and *a fortiori* has not established guilt beyond a reasonable doubt.

5. Petitioners allege that the Hobbs Act is unconstitutional for vagueness. They direct part of their attack specifically to the words "fear" and "wrongful", both of which appear in the definition of the term extortion in the Act which is said to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" (*supra*, p. 2; McConnon Pet. 17–20; Postma Pet. 17–20). There is nothing obscure about this definition as a whole or the simple and well-understood words used therein. Congress has defined extortion in its generally accepted meaning. With respect to this, Congressman Hobbs, the author of the Act said: "They [the terms robbery and extortion] have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially." 91 Cong. Rec. 11900. See also the remarks of Congressman Robsion at 91 Cong. Rec. 11906.

Petitioners' argument that the word "fear", construed to include fear of economic loss, renders the word so ambiguous as to require a finding of uncon-

stitutionality is but a variation of the arguments consistently rejected by the courts of appeals to the effect that use of economic power for personal enrichment is not an offense under the Act.[6] *United States* v. *Varlack,* 225 F. 2d 665 (C. A. 2); *United States* v. *Masiello,* 235 F. 2d 279 (C. A. 2), certiorari denied, *sub nom. Stickel* v. *United States,* 352 U. S. 882; *Callanan* v. *United States,* 223 F. 2d 171 (C. A. 8), certiorari denied, 350 U. S. 862; *United States* v. *Dale,* 223 F. 2d 181 (C. A. 7); *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8), certiorari denied, 349 U. S. 915; *Hulahan* v. *United States,* 214 F. 2d 441 (C. A. 8), certiorari denied, 348 U. S. 856. See also *Nick* v. *United States,* 122 F. 2d 660 (C. A. 8), certiorari denied, 314 U. S. 687, and *United States* v. *Compagna,* 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867. Petitioners are aware of this fact, but they advance the theory that the fact that these cases were not noted in *United States* v. *Green,* 350 U. S. 415, suggests that this Court recognized that they have improperly extended the

[6] It should be noted that before the adoption of this definition in the Hobbs Act, the courts of New York, in construing the New York extortion statute, consistently ruled that the use of fear of economic injury to induce another to turn over money or property for the personal use of the one demanding it constituted extortion. *People* v. *Wilzig,* 4 N. Y. Crim. 403 (1886); *People* v. *Barondess,* 133 N. Y. 649 (1892); *People* v. *Hughes,* 137 N. Y. 29 (1893); *People* v. *Weinseimer,* 117 App. Div. 603 (1907), affirmed, 190 N. Y. 537 (1907); *People* v. *Warden of City Prison,* 145 App. Div. 861 (1911), affirmed, 206 N. Y. 632 (1912); *People* v. *Rosenzweig,* 265 N. Y. 323 (1934); *People* v. *Lamm,* 292 N. Y. 224 (1944); and *People* v. *Bernoff,* 292 N. Y. 230 (1944). The Hobbs Act, which adopted the New York definition, is construed the same way.

ambit of the Hobbs Act. The obvious answer is that because the issue of extortion induced by fear of economic loss was not before this Court in the *Green* case, no such inference can be drawn.

There is likewise no merit to petitioners' contention that the failure of Congress to define the word "wrongful" is fatal. "Wrongful" was defined in the predecessor statute, the Anti-Racketeering Act of 1934, as the violation of the criminal laws of the United States or of any State or Territory.[7] No significance can be attached to the omission of the definition in the amended act, the prime purpose of which was to overcome the decision in *United States* v. *Local 807*, 315 U. S. 521. (See *United States* v. *Green*, *supra*, at p. 419.) Since legitimate labor activity may involve to some degree the use of fear, the use of the word "wrongful" was manifestly designed to limit the statute to situations where either the end or the means cannot be legally justified. See *Bianchi* v. *United States*, *supra*, 219 F. 2d at 189–190.

Petitioners' additional argument (McConnon Pet. 14, Postma Pet. 14) as to the vagueness of the term "affects commerce" has no application to this case since here the conspiracy was directed toward persons actually engaged in the transportation of goods in interstate commerce. The statute covers activities designed to "obstruct" and "delay" commerce as to which there can be no issue of vagueness. The very

[7] The question raised by Judge Biggs, in his dissenting opinion in *United States* v. *Kemble*, 198 F. 2d 889, 902 (C. A. 3), certiorari denied, 344 U. S. 893, as to whether the word "wrongful" likewise includes a private wrong is not germane here.

aim of the legislation is the protection of interstate commerce against injury from extortion. *United States* v. *Green, supra,* 350 U. S. at 420.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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